No. 88-699

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO,
Petitioner,

v.

JESSIE BERGER, RANDOLPH JACKSON, TOMMY KIRKLAND, VAN EDWARD LOUIS, RONALD TUCKER, ERNEST BELLAMY, GARRICK SIMMONS & WILLIE LEE MCMILLAN,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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A brief review of Respondents' opposition to the Petition for Writ of Certiorari re-enforces the conclusion that the Court of Appeals established a new standard for imposing vicarious liability on International Unions which is in conflict with this Court's decisions.

The Court of Appeals found that the conduct which was violative of Title VII and Section 1981 was the Local Union's converting of the Apprenticeship Program or the Training Program into an "educational prerequisite" to taking the journeyman exam. (Pet. App. 23a) The

Court also found, however, that the International Constitution neither required nor authorized Local Unions to require such an educational prerequisite. (Pet. App. 60a-61a)

The Court of Appeals imposed vicarious liability on the International Union based upon a "reasonable inference" of an agency relationship between the International and the Local Union (Pet. App. 61a) and an "inference" of International knowledge that a disparate impact was occurring. (Pet. App. 63a) It is respectfully submitted that the decision in this case sets up an entirely new standard for judging when an International Union will be held vicariously liable for the actions of an affiliated Local Union, which standard is contrary to this Court's decision in *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979) and its progeny.

Prior to the decision in this case, the Court of Appeals were relying on the "substantial relation" test for determining whether an International Union would be held liable for a Title VII violation committed by one of its affiliated Local Unions. (*See*, e.g., *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *modified on other grounds*, 556 F.2d 758, *cert. dism.*, 434 U.S. 801 (1977). In the instant case, the Court of Appeals correctly determined that the "substantial relation" test was inappropriate, having been developed prior to this Court's decision in *Carbon Fuel*, *supra*, and that the standards set out in *Carbon Fuel* represented the appropriate test for determining when an International Union will be held vicariously liable for the actions of an affiliate. After reaching this proper conclusion, the Court of Appeals then deviated from the *Carbon Fuel* test and, instead, relied on a test never before used in any case, namely, a "reasonable inference" test.

Under *Carbon Fuel*, there must be evidence that the International Union authorized, ratified, or participated

in the illegal conduct. (*Carbon Fuel Co.*, 444 U.S. at 217-18) This Court specifically discussed the Congressional intent supporting this standard:

> "In the face of Congress' clear statement of the limits of an International Union's legal responsibility for the acts of one its Local Unions, it would be anomalous to hold that an International is nonetheless liable for its failure to take certain steps in response to actions of the Local. Such a rule would pierce the shield that Congress took such care to construct." (*Id.* at 217-18)

Certainly the *Carbon Fuel* standard requires more than a mere "inference" of the predicates necessary to establishing the liability of an International Union.

The cases cited by Respondents demonstrate the novel nature of the decision in this case. Thus, at Page 11, Footnote 9 of Respondents' Brief, Respondents cite a string of cases for the proposition that this case "is just another in a long line of cases holding International Unions liable under Title VII and Section 1981 for discriminatory conduct at the local level." In addition to the fact that most of those cases are based on the "substantial relation" test, none of those cases support the novel theory in this case that a Court can "infer" the necessary predicates to establish vicarious liability for, in each, there was direct evidence of the International Union's participation in the illegal conduct. *See, e.g., Howard v. International Molders & Allied Workers' Union*, 779 F.2d 1546 (11th Cir.), *cert. den.*, 476 U.S. 1174 (1986); *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *modified on other grounds* 556 F.2d 758, *cert. dism.*, 434 U.S. 801 (1977) and *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. den.*, 429 U.S. 920 (1976) (International representatives in each case acted as advisors to Local Unions and played active roles in the negotiations leading to discriminatory practices); *Sagers v. Yellow Freight Systems, Inc.*, 529

F.2d 721 (5th Cir. 1976) (The collective bargaining agreement which perpetuated the discrimination was negotiated on a national level and the International President, International Vice-President, International Secretary-Treasurer and International General Organizer all served on the negotiating team); *Kaplan v. IATSE*, 525 F.2d 1354 (9th Cir. 1975) (International negotiated and was signatory to the bargaining agreement which incorporated the discriminatory roster provisions); *Wheeler v. American Home Products Corp*, 19 FEP Cas. (BNA) 143 (N.D. GA. 1979) (Plaintiff requested assistance to end the discriminatory treatment, which assistance was denied Plaintiff by both the Local Union and the International); *Taylor v. Armco Steel Corp.*, 373 F.Supp. 885 (S.D.TEX. 1973) (International Union entered into a "Master Agreement" with the employer in addition to signing the "Local Working Agreements" between the employer and the Local Union pursuant to which the discriminatory practices were conducted); *Goodman v. Lukens Steel Co.*, 482 U.S. ——, 96 L.Ed.2d 572 (1987) (The International Union was the "certified bargaining agent" of the employees and the Local Union acted "on its behalf." (*Id.*, 96 L.Ed.2d at 581 n. 4))

To Petitioner's knowledge, the instant case is the only case holding that vicarious liability can be imposed upon an International Union on the basis of "inferring" an agency relationship and "inferring" knowledge of a disparate impact. Presumably, if Respondents' counsel were aware of another such case, they certainly would have cited it. This "reasonable inference" standard is made even more egregious since the Court used this inference to find the International guilty of discrimination against Plaintiffs in violation of Section 1981 which constitutes intentional discrimination. (Pet. App. 63a)

Respondents argue that this case raises no issue of law warranting review. Petitioner submits that this case raises a serious issue which requires review by this Court,

namely, whether the *Carbon Fuel* standard of liability must be followed in Title VII actions or whether a Court may impose vicarious liability upon an International Union under this novel and undefined "reasonable inference" standard. This is a critical question which will have a far ranging impact on whether International Unions will continue or cease their attempts to increase minority participation in the ranks of their affiliated Local Unions.

With respect to the policy considerations presented by the underlying decision, the Respondents blithely state that this decision will not discourage other International Unions from endeavoring to eliminate racial discrimination at the Local Union level by creating, endorsing or administering affirmative action programs. (Respondents' Brief Page 12) Petitioner would submit that that argument ignores the significance of the underlying decision. Here, the Court of Appeals specifically noted the beneficial aspects of the Training Program which the International participated in creating *at the request of the Federal Government*:

> "With the Training Program, the International 'acted to create a vehicle that would bring into [the Iron Workers Trade] a high percentage of minorities who when they finished this Training Program would be qualified to earn a living at the Iron Workers' negotiated wage scale.' TR. at 3298. As applied to *inexperienced* blacks, the program did indeed open new avenues of opportunity that previously may have been closed; in that respect, the Training Program is to be commended." (Pet. App. 62a [emphasis the Court's])

Notwithstanding that praise, the Court went on to find that the Training Program was discriminatory in one aspect:

> "But in aiming the Training Program broadly at all non-members who were not qualified to enter the

> Apprenticeship Program, the International endorsed a system that placed unnecessary barriers between *experienced* black Rodmen and union membership." (*Id.* [emphasis the Court's])

Despite Respondent's arguments to the contrary, there was absolutely no evidence that the International Union ever "endorsed" the educational requirement or even knew of the educational requirement. In relieving the Training Program and the Apprenticeship Committee themselves from liability, the Court of Appeals noted in its decision on Petition for Rehearing:

> "The *only* practice (along with acts of retaliation) that we held to violate Title VII or Section 1981 was the Local's requirement that experienced Rodmen complete an educational program run by one of the two committees. The Plaintiffs have pointed to no record evidence demonstrating that either the Training Program or the Apprenticeship Committee had any role (or any authority) relevant to that practice. Most significantly, the Plaintiffs have not pointed to any findings by the District Court that even arguably form an adequate predicate for holding these distinct entities liable jointly with Local 201 for the *unilateral acts of that Local*." (Pet. App. 91a [partial emphasis the Court's, partial emphasis added])

Likewise, there was no evidence that the International Union had any role relative to that practice and, indeed, the Court found that the International's Constitution did not authorize such a practice. Thus, like the Employer Council, and the Training Program and the Apprenticeship Committee, the International, which is a distinctly separate legal entity, should have been relieved from liability for this practice.

If this newly-created ability to "infer" knowledge and responsibility to an International Union is permitted to stand, other International Unions will certainly shy away from undertaking any involvement in affirmative action programs in the future for fear of being held

vicariously liable for Local administration of those programs, as to which administration the International may have no involvement and no knowledge. This cannot be the result which Congress envisioned when it enacted Title VII and Section 1981.

CONCLUSION

It is respectfully submitted that this Court should grant the Petition for Writ of Certiorari and take this opportunity to specifically set forth the standard by which an International Union must be judged in the Title VII context before vicarious liability may be imposed upon it for the actions of an affiliated Local Union. If courts are permitted to impose vicarious liability upon International Unions based on nothing more than "inferences," this decision will denude the standards set forth by this Court in *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979) and will destroy the "shield that Congress took such care to construct" (*Id.* at 218) in limiting International Unions' legal responsibility for the acts of their affiliated Local Unions.

Respectfully submitted,

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